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IN THE SUPREME COURT OF THE UNITED STATES
OF AMERICA

October Term, 1994

EARL LEROY NELSON
Petitioner

v.

COMMONWEALTH OF VIRGINIA
Respondent

Petition for Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

Name of the member of the Bar of this Court who is counsel of record for appellant:

Norman Hunter Lamson

Such attorney is counsel of record

Norman Hunter Lamson
619-B E. High Street
Charlottesville, VA 22902
(804) 979-8159

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QUESTION PRESENTED FOR REVIEW

Whether a state criminal arrest warrant charging that an accused did operate a motor vehicle under the influence of alcohol "(sub offense)" adequately informs him of the nature of the charge under the Sixth Amendment of the U. S. Constitution to permit punishment of him as a second offender under Virginia's enhanced punishment provisions without violating federal due process of law.

LIST OF ALL PARTIES TO THE PROCEEDING

The names of all parties appear in the caption to the case.

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REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE.

There is no written opinion in the case.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

A. Date of the entry of the judgment: June 2, 1994.

B. Date of any order respecting a rehearing or granting an extension of time: August 1, 1994.

C. Express reliance on Rule 12.3: not applicable.

D. Statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari: 28 U.S.C. sec. 1254.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE:

Amend. XIV of the U. S. Constitution, "[N]or shall any state deprive any person of life, liberty, or property without due process of law..."

Amendment VI of the U. S. Constitution, in pertinent part,
"In all criminal prosecutions, the accused shall enjoy the right... to be informed of the nature and cause of the accusation..."

Section 18.2-266 of the Code of Virginia (1950),
"It shall be unlawful for any person to drive or operate any motor vehicle, engine or train (i) while such person has a blood alcohol concentration of 0.10 percent or more by weight by volume as indicated by a chemical test administered in accordance with the provisions of sec. 18.2-268, (ii) while such person is under the influence of alcohol, (iii) while such person is under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature, or any combination of such drugs, to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely, or (iv) while such person is under the combined influence of alcohol and any drug or drugs to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely. For the purposes of this section, the term 'motor vehicle' shall include mopeds, while

operated on the public highways of this Commonwealth."
(1988 Replacement Vol. 4 as in effect on July 1, 1991).

Section 18.2-270 of the Code of Virginia, as in effect on July 1, 1991,

"Any person violating any provision of sec. 18.2-266 shall be guilty of a Class 1 misdemeanor.

Any person convicted of a second offense committed within less than five years after a first offense under sec. 18.2-266 shall be punishable by a fine of not less than $200 nor more than $2,500 and by confinement in jail for not less than one month nor more than one year. Forty-eight hours of such confinement shall be a mandatory, minimum sentence not subject to suspension by the court. Any person convicted within a period of five to ten years of a first offense under sec. 18.2-266 shall be punishable by a fine of not less than $200 nor more than $2,500 and by confinement in jail not less than one month nor more than one year. Any person convicted of a third offense or subsequent offense committed within ten years of an offense under sec. 18.2-266 shall be punishable by a fine of not less than $500 nor more than $2,500 and by confinement in jail for not less than two months nor more than one year. Thirty days of such confinement shall be a mandatory, minimum sentence not subject to suspension by a court if the third or subsequent offense occurs within less than five years. Ten days of such confinement shall be a mandatory, minimum sentence not subject to suspension by the court if the third or subsequent offense occurs within a period of five to ten

years of a first offense."
(1991 Cumulative Supp.).

section 18.2-11 of the Code of Virginia (1950),

The authorized punishments for conviction of a misdemeanor are:

(a) For Class 1 misdemeanors, confinement in jail for not more than twelve months and a fine of not more than $2,500, either or both...

sec. 18.2-271 of the Code of Virginia (1950), effective July 1, 1991,

"A. Except as provided in sec. 18.2-271.1, the judgment of conviction if for a first offense under sec. 18.2-266 or for a similar offense under any county, city, or town ordinance, or for a first offense under subsection A of sec. 46.2-341.24, shall of itself operate to deprive the person so convicted of the privilege to drive or operate any motor vehicle, engine or train in the Commonwealth for a period of six months from the date of such judgment.

B. If a person is tried on a process alleging a second offense of violating sec. 18.2-266 or subsection A of sec. 46.2-341.24 within ten years of a first offense for which the person was convicted under sec. 18.2-266 or subsection A of sec. 46.2-341.24 and is convicted thereof, such person's license to operate a motor vehicle, engine or train shall be revoked for a period of three years from the date of the judgment of conviction. Any such period of license suspension or revocation, in any case, shall run consecutively with any period of suspension for failure to permit a blood or breath sample to be taken as required by sec.

18.2-268 or sec. 46.2-341.26. If any person has heretofore been convicted or found not innocent in the case of a juvenile of violating any similar act in the Commonwealth or any other state and thereafter is charged with a second violation of sec. 18.2-266 or subsection A of sec. 46.2-341.24 and convicted of violating the provisions of sec. 18.2-266 or subsection A of sec. 46.2-341.24, such conviction or finding shall, for the purpose of this section and sec. 18.2-270, be a subsequent offense and shall be punished accordingly.

C. If a person is tried on a process alleging a third or subsequent offense of violating sec. 18.2-266 or subsection A of sec. 46.2-341.24 and convicted thereof, such person shall not be eligible for participation in a program pursuant to sec 18.2-271.1 and shall have his license revoked as provided in subsection B of sec. 462.-391. The court trying such case shall order the surrender of the driver's license of the person so convicted, to be disposed of in accordance with sec. 46.2-398, and shall notify such person that his license has been revoked indefinitely.

D. Notwithstanding any other provision of this section, the period of license revocation or suspension shall not begin to expire until the person convicted has surrendered his license to the court or to the Department of Motor Vehicles.

E. The provisions of this section shall not apply to, and shall have no effect upon, and disqualification from operating a commercial motor vehicle imposed under the provisions of the Commercial Driver's License Act (sec. 46.2-341.1 et. seq.)."

sec. 18.2-271 of the Code of Virginia (1950), after amendments effective, July 1, 1992,

"A. Except as provided in sec. 18.2-271.1, the judgment of conviction if for a first offense under sec. 18.2-266 or for a similar offense under any county, city, or town ordinance, or for a first offense under subsection A of sec. 46.2-341.24, shall of itself operate to deprive the person so convicted of the privilege to drive or operate any motor vehicle, engine or train in the Commonwealth for a period of one year from the date of such judgment.

B. If a person is (i) tried on a process alleging a second offense of violating sec. 18.2-266 or subsection A of sec. 46.2-341.24 within ten years of a first offense for which the person was convicted, or found guilty in the case of a juvenile, under sec. 18.2-266 or subsection A of sec. 46.2-341.24 or any valid county, city, or town ordinance or law of any other state of the United States substantially similar to sec. 18.2-266 or subsection A of sec. 46.2-341.24 and (ii) is convicted thereof, such person's license to operate a motor vehicle, engine or train shall be revoked for a period of three years from the date of the judgment of conviction. Any such period of license suspension or revocation, in any case, shall run consecutively with any period of suspension for failure to permit a blood or breath sample to be taken as required by sec. 18.2-268.1 through 18.2-268.12 or sec. 46.2-341.26:1 through 46.2-341.26:11.

C. If a person is tried on a process alleging a third or subsequent offense of

violating sec. 18.2-266 or subsection A of sec. 46.2-341.24 within ten years of two other offenses for which the person was convicted, or found guilty in the case of a juvenile, under sec. 18.2-266, subsection A of sec. 46.2-341.24 or any valid county, city or town ordinance or law of any other state or of the United States substantially similar to sec. 18.2-266 or subsection A of sec. 46.2-341.24, and is convicted thereof, such person shall not be eligible for participation in a program pursuant to sec 18.2-271.1 and shall have his license revoked as provided in subsection B of sec. 46.2-391. The court trying such case shall order the surrender of the driver's license of the person so convicted, to be disposed of in accordance with sec. 46.2-398, and shall notify such person that his license has been revoked indefinitely.

D. Notwithstanding any other provision of this section, the period of license revocation or suspension shall not begin to expire until the person convicted has surrendered his license to the court or to the Department of Motor Vehicles.

E. The provisions of this section shall not apply to, and shall have no effect upon, and disqualification from operating a commercial motor vehicle imposed under the provisions of the Commercial Driver's License Act (sec. 46.2-341.1 et. seq.)."

Sec. 18.2-271.1 of the Code of Virginia, effective July 1, 1991,

"A. Any person convicted of a violation of sec. 18.2-266(i), (ii), (iii), or (iv), or any ordinance of a county, city,

or town similar to the provisions thereof, or provisions of subsection A of sec. 462.-341.24, or any second offense thereunder, may, with leave of court or upon court order, enter into an alcohol safety action program in the judicial district in which such charge is brought or in any other judicial district upon such terms and conditions as the court may set forth...

E. Except as otherwise provided herein, whenever a person enters a certified program pursuant to this section, and such person's license to operate a motor vehicle, engine or train in the Commonwealth has been suspended or revoked, the court may, in its discretion and for good cause shown, provide that such person be issued a restricted permit to operate a motor vehicle for any or all of the following purposes: (i) travel to and from his place of employment; or (ii) travel to an alcohol rehabilitation program entered pursuant to this subsection; or (iii) travel during the hours of such person's employment if the operation of a motor vehicle is a necessary incident of such employment... Such restricted license shall be conditioned upon enrollment within fifteen days in, and successful completion of, a program as described in subsection A of this section. No restricted license shall be issued during the first four months of a revocation imposed pursuant to subsection B of sec. 18.2-271 or subsection A of sec. 46.2-391 for a second offense of the type described therein committed within ten years of a first such offense. No restricted license shall be issued during any revocation period imposed pursuant to subsection C of sec. 18.2-271 or subsection B of sec. 46.2-391...

CONCISE STATEMENT OF THE CASE

Defendant was arrested by a deputy sheriff of the City of Staunton, Virginia, on a warrant charging that in the City of Staunton, Virginia, he on or about January 12, 1992, did unlawfully in violation of Section 18.2-266 of the Code of Virginia "OPERATE A MOTOR VEHICLE ON THE PUBLIC HIGHWAY WHILE UNDER THE INFLUENCE OF ALCOHOL. (SUB OFFENSE)." Said warrant was executed by arresting accused on January 12, 1992. From a judgment in the general district court where he had different counsel than the undersigned, he appealed to the circuit court. In the circuit court, defendant pleaded "not guilty".

In a bench trial held on July 28, 1992, in which accused was again represented by different counsel than the undersigned, defendant was found guilty

"as charged." At trial, among other things, a conviction and sentence of driving under the influence in the Staunton General District Court entered on July 22, 1987, was introduced into evidence without objection by the defendant or his counsel. The trial court's order recites the accused as being before the court on an appeal on a charge of "driving under the influence, 2nd offense, Virginia Code section 18.2-266." The trial court fixed defendant's punishment at confinement in jail for a period of thirty days, a fine of $300.00, suspension of his operator's license for a period of thirty-six months, and payment of costs of the proceedings. The Court further suspended 28 days of the 30 day jail sentence on condition that he keep the peace and be of good behavior.

Defendant obtained the undersigned counsel who noted appeal to the Virginia

Court of Appeals and filed a petition for appeal therein. In such petition counsel raised for the first time the contention herein, namely, that the federal Sixth Amendment's guarantee to the accused of the right to be informed on the nature and cause of the accusation was binding on the states by the Due Process Clause of the federal Fourteenth Amendment, and that such provisions were violated in so far as the Commonwealth of Virginia sought to impose enhanced punishment on the accused as a second offender without giving notice of such. Such Court denied the petition by judgment dated November 23, 1993. Defendant then filed a petition for rehearing again raising such federal arguments which was denied by order dated January 4, 1994. Defendant then filed in said court a notice of appeal to the Virginia Supreme Court.

He then filed a petition for appeal to said Virginia Supreme Court again raising such federal arguments which denied it by Order dated June 2, 1994. Petitioner filed a petition for rehearing before such Court raising the same arguments which denied such petition by Order dated August 1, 1994. On motion by petitioner, such Court deferred issuance of its mandate so long as petitioner pursued his appeal before this Honorable Court.

Petitioner then filed the herein petition for writ of certiorari to the Virginia Supreme Court.

DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The language of the Fourteenth Amendment's Due Process clause is similar to that of the federal Fifth Amendment due process clause. In Murray's lessee, etc. v. Hoboken Land and Improvement Co., 59 U. S. (18 Howard) 272, 276 (1855), the Court said in reference to the Fifth Amendment, "The words 'due process of law', were undoubtedly intended to convey the same meaning as the words, 'by the law of the land' in Magna Charta [Ch. 29, codified]," citing Lord Coke's Commentary in 2 Inst. 50. After noting that the constitution contains no description of the processes permitted or forbidden, and that it does not even declare the principles to be applied to ascertain what is due process, the Court asked, "To what principles, then, are we to resort to ascertain whether this process, enacted

by congress, is due process?" The Court stated,

> To this the answer must be twofold. We must examine the constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of the country.

Id. at 276-277.

Subsequent to the adoption of the Fourteenth Amendment, this Court has by and large followed a similar approach to what constitutes state denial of due process. The first prong is popularly referred to as the "incorporation by reference" approach, where the Court decrees certain enumerated rights in the federal Bill of Rights incorporated by reference under the Fourteenth Amendment due process clause. However, full incorporation by reference, of which Mr.

Justice Hugo Black was the leading exponent, has never apparently taken hold with all members of the Court, leading to so-called "selective incorporation by reference."

Turning to the first prong of the due process test, and examining the Sixth Amendment, this Court has never expressly ruled whether the nature and cause clause is incorporated by reference in a case dealing with that precise issue.[1] However, it has had occasion to consider whether each other right of an accused in a criminal proceeding contained in the Sixth Amendment is incorporated, holding in each instance that it was. See cases

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1. In Twitchell v. Commonwealth, 7 Wal. 321 (74 U.S.) (1868), a pre-Fourteenth Amendment case, this Court held that the Sixth Amendment was binding on the federal government only, not the states, following the views of Barron v. Mayor, etc., of Baltimore, 7 Peters U.S.R. 243.

cited in Faretta v. California, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). And in Faretta itself, this Court said, "The Sixth Amendment includes a compact statement of the rights necessary to a full defense: ... Because these rights are basic to our adversary system of criminal justice, they are part of the 'due process of law' that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the States."

In addition, several federal circuit courts and at least one federal district court have expressly held such clause "incorporated" against the states by the Due Process clause. Ricalday v. Procunie, 736 F.2d 203, 207 fn. 4 (5th Cir. 1984); Hunter v. State of New Mexico, 916 F.2d 595, 599 (10th Cir. 1990); Gittens v. Scully, 737 F. Supp. 840, 843 (S.D.N.Y. 1990). And this Court has

stated, "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." Cole v. Arkansas, 333 U. S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948). Furthermore, in Lankford v. Idaho, 500 U. S. ---, 111 S.Ct. ---, 114 LE.2d 173 (1991), the Court stated, "Notice of issues to be resolved by the adversary process is a fundamental characteristic of due process of law," vacating a death sentence where the accused did not have adequate notice that he faced the death penalty as a punishment.

The Virginia Bill of Rights includes a clause similar the nature and cause clause reading, "That in criminal prose-

cutions a man hath a right to demand the nature and cause of the accusation..." Va. Constitution, Art. I, sec. 8 (1971). Her Supreme Court has noted, "It is a fundamental proposition that in all cases, civil as well as criminal, a person haled into court has the right to demand that he be told in plain, intelligible language what is the cause of the complaint against him; and this right, in so far as it relates to crimes, is guaranteed by both the federal and State Constitutions... It will be observed that the language of the two Constitutions is substantially the same." Pine v. Commonwealth, 121 Va. 812, 831, 93 S.E. 652 (1917) (decided under an identically worded provision of the Virginia Constitution of 1902). It is believed that virtually all, if not all, states have a similarly worded provision in their

constitutions. See The American Law Institute, Code of Criminal Procedure, Tentative Draft No. 1, Commentary to Sec. 159 (1928). Defendant will proceed on the assumption that the "nature and cause" clause is incorporated by reference, and is binding on the states.

The basic requirements of the notice and cause clause are that the accusation of crime inform the accused of each essential element of the offense against him and that it descend to particulars so that he may prepare his defense and plead the outcome of the case in bar to any subsequent prosecution. Hamling v. United States, 418 U. S. 87, 117 (1973), Hagner v. United States, 285 U.S. 427, 431 (1931), United States v. Cruikshank, 92 U.S. 542, 558 (1875). The elements of the crime under Virginia law of driving a motor vehicle while under the influence of intoxicants are set forth in

sec. 18.2-266 of the Code of Virginia which proscribes in pertinent part (1) driving or operating (2) a motor vehicle (3) while under the influence of alcohol (part ii). It is to be noted, however, that sec. 18.2-271 of the Code of Virginia, as effective on July 1, 1992, added additional requirements on the contents of the accusation of crime if an enhanced penalty, as authorized by such section and sec. 18.2-270, was to be imposed, namely, that it allege "a second offense of violating sec. 18.2-266 or subsection A of sec. 46.2-341.24 within ten years of a first offense for which the person was convicted, or found guilty in the case of a juvenile, under sec. 18.2-266 or subsection A of sec. 46.2-341.24 or any valid county, city, or town ordinance or law of any other state or of the United States substantially similar to sec.

18.2-266 or subsection A of sec. 46.2-341.24.[2] Accused contends that in so far as the Commonwealth sought to impose the enhanced punishment provisions on him as a second offender (mandatory 48 hours in jail versus the right to a fully suspended sentence; three year license suspension versus one year license suspension; and eligibility for a restricted license only after the first four months on enrollment in an Alcohol Safety Action program, versus immediate eligibility for such license on entry into such program),

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2. Because Virginia follows the rule that "procedural" changes in the law are effective immediately and apply to then pending suits, whereas "substantive" changes may not be applied retroactively, undersigned counsel will assume that the amendments to sec. 18.2-271 effective July 1, 1992, affecting the contents of the "process" applied to him, and necessitated that the process meet such requirements at the time of the July 28, 1992, trial. Nevertheless, even if such amendments would not so apply, the analysis and result is the same under sec. 18.2-271 as in effect on July 1, 1991.

such provisions were an element of the offense which had to be pleaded, and since they were not, such enhanced punishment violates his Sixth and Fourteenth Amendment rights.[3] As noted by Mr. Joel Bishop, said by Mr. Justice Antonin Scalia to be the foremost American author of the criminal law of the nineteenth century, "But the 'nature and cause' of an accusation are not stated where there is an omission of anything necessary in law to justify the punishment." Bishop, New Criminal Procedure, sec. 88 (2d ed. 1913). In Singer v. United States, 278 F. 415 (3rd Cir. 1992), the Court stated,

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3. The warrant does, after setting forth the elements of sec. 18.2-266 conclude, "(SUB OFFENSE)." Whether such language can be construed to mean "subsequent offense" or as a legitimate equivalence of the statutorily required language will be discussed below. For now, we will treat the warrant as if it contained no recidivist allegation at all.

in a case where the statute required that the prior conviction be pleaded, "[the prior conviction] is an element of the offense in the sense that it aggravates the offense described in the indictment, and authorizes the increased punishment." Also, lower federal courts have followed a similar approach in attempting to determine whether statutory matter pertinent to a mandatory enhanced punishment must be pleaded by attempting to determine whether it is an "element" of the offense, or whether it is a "sentence enhancement" provision. Compare United States of America v. Crawford, -- F.3d --- (published decision decided March 15, 1994, Record No. 93-5282) (4th Cir. 1994), holding that 8 U.S.C. sec. 1326(b) is not an element 8 U.S.C. sec. 1326(a), but a mere sentence enhancement, so that the prior aggravated felony need not be pleaded in the indictment, with United

States v. Campos-Martinez, 976 F.2d 589 (9th Cir. 1992), holding that because the previous conviction was an element of the sec. 1325 offense, it was an element of the 1326(b)(1) or (b)(2) offense so as to create a new and separate offense.

Note that the issue here is not whether Virginia could consistently with federal due process impose an enhanced punishment upon a second or subsequent conviction where its statutory law imposed no pleading requirements on the process for imposition of enhanced punishment. For example, in Deal v. United States, -- U. S. --- (decided May 17, 1993, No. 91-8199)(1993), this Court permitted enhanced punishment for violations of 18 U.S.C. sec. 924(c)(1), dealing with carrying and using a gun during a crime of violence, where Congress intended enhanced punishment for a second

or subsequent conviction without regard to whether the offender had been convicted of his prior offense prior to engaging in his subsequent repeat criminal conduct. Rather, the issue is, whether having chosen by her statutory law to inform her citizens that they will not be subject to enhanced punishment unless the process contains certain specific allegations, Virginia can then impose enhanced punishment on one its citizens when the process lacks that allegation.

Even if this Honorable Court should reject the view that the Sixth Amendment is incorporated, or, if of the view that it is incorporated but that the pertinent provisions of sec. 18.2-271 do not create an element of the offense which must be pleaded to impose enhanced punishment under the Sixth Amendment, we still must examine the second prong of due process

of law. But before doing so, let us determine whether the allegation "(sub offense)" can in any manner constitute such a recidivist allegation. "Sub" appears by its placement before the word "offense" unquestionably to be an abbreviation of a word in the English language. The Code of Virginia does not anywhere define "sub". Turning to the dictionary for the definition, we find the following as its definition when used as an adjective:

> [short for subordinate]: AUXILIARY, SUBORDINATE, SECONDARY < a sub post office> <a subtheme in a music>.

Webster's Third New World Dictionary.

And when used as an abbreviation, it means,

> 1 subaltern 2 subcontractor 3 sublieutenant 4 submerge; submerged 5 subordinate 6 subscriber; subscription 7 subsidiary 8 suburb; suburban 9 subserve 10 supplementary unemployment benefit

Id..

Note that Virginia does not have any statute expressly prohibiting the use of abbreviations in criminal accusations. (Compare 4 Geo. II.c. 26 and 6 Geo. II.c. 14 requiring all indictments to be in words at length. These sections "prohibit[] all abbreviations in indictments." II Hale, Pleas of the Crown, Ch. XXIV, page 169, fn (g)). The common law rule was that abbreviations were permissible only when they have a well recognized meaning. II Hale at 169. This common law rule has been recognized by the following authorities: King v. Dearing-Orman Mercantile Co., 82 So. 627 (Ct. App. Ala. 1919); State v. McPherson, 87 N.W. 421, 422 (Iowa 1901); Molton v. State, 16 S.W. 423, 29 Tex. App. 527 (1891); People v. Allen, 289 N.E.2d 467, 468 (Ill. App. 1972); City of Raytown v. Roach, 360 S.W.2d 741, 743 (Mo. Ct. App. 1962); United States v. Reichert, 32 F.

142, 147 (9th Cir. 1887); State v. Edmundson, 94 S.E.2d 844, 845 (N. C. 1956). While Virginia has no case law directly discussing the use of abbreviations, in Lazier's Case, 51 Va. (10 Gratt.) 708, 712-713 (1853) the Court appeared implicitly to recognize the rule by upholding the use of figures whose meanings are well recognized instead of words in setting out the dates in an indictment. We will accept it that "sub" is not such a well recognized abbreviation for "subsequent" that it could be used in a criminal warrant, even if a dictionary could be found setting forth such as its meaning.

Note that Virginia law does allow the remainder of a criminal charge to stand where we can reject the meaningless matter as surplusage. Shiflett's Case (No. 1), 114 Va. 876, 878 (1913). And

under the rule in Satterfield's Case, 105 Va. 867, 871-872 (1906), if the former conviction is not sufficiently stated, or not proven at trial, "the indictment will still be good for the offense charged therein without reference to the former conviction." We will thus treat the charge as validly charging a first offense, which petitioner conceded before the Virginia Supreme Court that it did.

Examining then the settled usages and practices of our ancestors in England before the emigration, we find, for example, in Sergeant Hawkins, Pleas of the Crown, ch. 40, sec. 3, "where a statute makes a second offence felony, or subject to a heavier punishment than the first, it is always implied that such second offence ought to be committed after a conviction for the first; for the gentler method shall first be tried which

may perhaps prove effectual." We will accept is as the established practice that under the ancient English common law the accusation must contain each element essential to punishment.

Turning next to the question of whether such usage was adopted in this country after the settlement, the answer is unquestionably in the affirmative. Looking again to Mr. Bishop for the early American common law, we have in his chapter entitled Whatever is Legally Essential to the Punishment Must Be Alleged in the Indictment,

"The doctrine of this chapter is, that every wrongful fact, with each particular modification thereof, which, in law, is required to be taken into the account in determining the punishment upon a finding of guilty, must be alleged in the indictment.

This doctrine is fundamental. Originating in natural reason and abstract justice, it has been adopted into the common law and confirmed by our written constitutions.

...

If a man is charged with acts legally

punishable by imprisonment, then is hung for them, he is not punished, he is murdered. It is no more just to take his life on an accusation of something to which the law attaches a less penalty, than to do it with no accusation...

This doctrine pervades the entire adjudged law of criminal procedure. It is made apparent, not alone by a single case, but by all the cases.

Bishop, New Criminal Procedure, sec.'s 77-81 (2d ed. 1913). Virginia herself has recognized this doctrine in the driving under the influence context:

Code sec. 18.1-58, as amended (1973 Cum. Supp.), provides for a heavier penalty for conviction of a second or subsequent offense within a period of ten years after a conviction of a similar offense of operating a motor vehicle while under the influence of intoxicants. The purposes of an allegation in a warrant or indictment that an accused has been previously convicted of a similar offense are to put him on notice that proof of his prior conviction will be introduced in evidence, and to permit the imposition of a heavier punishment if the second or subsequent offense is proved. For the heavier punishment to be imposed by the jury or the court trying the case without a jury, 'the prior offense must be charged and proven.' [cites omitted].

Calfee v. Commonwealth, 215 Va. 253, 255, 208 S.E.2d 740 (1974).

As noted by Story, the friend of Chief Justice John Marshall, the "law of the land" clause "in effect affirms the right of trial according to the process and proceedings of the common law." II Story, Commentaries on the Constitution, Bk, III, sec. 1789. And this Court has recently noted, "Due Process traditionally requires that criminal laws provide prior notice both of the conduct to be prohibited and of the sanction to be imposed." Mine Workers v. Bagwell, -- U.S. --, --S.Ct. --, (decided 6/30/94).

The due process clause in effect constitutionalizes the rules of criminal process of our English ancestors before the settlement adopted in this country after the settlement. The rule that the accusation must contain each element essential to punishment is fundamental. The due process clause does not merely reach violations of express constitution-

al provisions, for otherwise there would have been no occasion to put it in the Constitution. Thus, even if the Sixth Amendment is not violated, the enhanced punishment in this case still violates due process of law.

We have only left to consider the matter of the fact that these points were not raised until defendant engaged the undersigned for appeal. The Virginia Court of Appeals refused a petition for error, citing its contemporaneous objection rule and the fact that these matters were not brought to the attention of the trial court. This essentially is a waiver argument. Waivers must be not only voluntary but must be knowing, intelligent acts with sufficient awareness of the relevant circumstances and likely consequences. Brady v. United

States, 397 U. S. 742, 748 (1970). Waiver of a constitutional right is never presumed. This record will not support a contention by the Commonwealth of waiver.

Simply by pleading "not guilty" to a charge of first offense and proceeding to trial, defendant cannot be held to have waived his right not to be sentenced for a higher grade of offense. This Court has stated "A strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial." Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The defect here is in the nature of a jurisdictional defect, for no court can impose punishment for a higher offense than stated in the accusation. The Supreme Court of

Virginia itself has stated that a judgment in excess of that which the court rendering it had power to pronounce is void as to the excess only. Royster v. Smith, 195 Va. 228, 237 (1953), Deagle v. Commonwealth, 214 Va. 304, 305 (1973). And error in sentencing will lead to a remand for resentencing. Bell v. Commonwealth, 11 Va. App. 530, 534, 399 S.E.2d 450, 453 (1991). Jurisdictional errors can be asserted at any time, even on appeal for the first time.

"An essential element of a crime - one that affects a substantial right - is 'one whose specification... is necessary to establish the very illegality of the behavior and thus the court's jurisdiction.' United States v. Cina, 699 F.2d 853, 859 (7th Cir. 1983), cert. denied, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983)," cited in U. S. v. Hooker,

841 F.2d 1225, 1231 (4th Cir. 1988)(en banc). And while courts will be more liberal in construing indictments after verdict than before, and will then indulge in every intendment in support of the sufficiency, U. S. v. Pupo, 841 F.2d 1235, 1239 (4th Cir. 1988)(en banc), such liberalization cannot extend to adding an element which is not there.

CONCLUSION

The accused had a right under the Sixth Amendment to be tried on a warrant charging each essential element of driving under the influence. Where the statute imposes an enhanced punishment for a second or subsequent offense, and requires such to be pleaded as a prerequisite to such enhanced punishment, the recidivist allegations are an element of the offense. A warrant which charges him merely with driving under the influence "(sub offense)", and does not contain such required recidivist allegations is insufficient under the Sixth and Fourteenth Amendments to permit imposition of enhanced punishment.

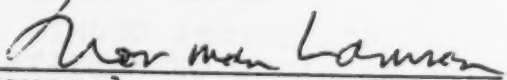
Furthermore, under the old English common law adopted in this country, the accusation must contain each element essential to punishment. Such rule is fundamental so that a conviction in

violation of it violates due process of law regardless of whether the Sixth Amendment is violated. Since the warrant did not allege a prior conviction as required by the statute, the trial court's effort to impose enhanced punishment violated due process of law.

The judgment of conviction should be vacated and a new trial awarded, or the case be remanded for resentencing.

Respectfully submitted,

EARL LEROY NELSON

By 
Counsel

Norman Lamson
619-B E. High Street
Charlottesville, VA 22902
State Bar ID # 19765
5elnpetcs

APPENDIX

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VIRGINIA: IN THE SUPREME COURT OF VIRGINIA held at the Supreme Court Building in the City of Richmond on Thursday the 2nd day of July, 1994.

Earl Leroy Nelson, Appellant,

against Record No. 940188

Court of Appeals No. 1703-92-3

Commonwealth of Virginia, Appellee.

From the Court of Appeals
of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

A copy,

Teste:

David B. Beach Clerk

By: A. A ie [?]

Deputy Clerk

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF STAUNTON.

CITY OF STAUNTON

ORDER

V. MISDEMEANOR CR92000054-00

EARL LEROY NELSON

DATE OF BIRTH: August 22, 1956

This day, came the Attorney for the Commonwealth and Earl Leroy Nelson, who is before this Court on an appeal from Staunton General District Court on a charge of driving under the influence, 2nd offense, Virginia Code section 18.2-266, and also came John R. Hooe, III, his self-employed counsel. Whereupon the defendant entered a plea of not guilty by counsel and, no jury having been requested, the Court proceeded to hear and determine this case without the intervention

of a jury as provided by law.

The Court, having heard the evidence and the views of counsel, finds the defendant guilty as charged and affixes his punishment at confinement in jail for a period of thirty days, a fine of $300.00, suspension of his operator's license for a period of thirty-six months, and payment of the costs of prosecution. The Court doth order that twenty-eight days of the thirty day jail sentence be suspended for a period of one year upon condition that the defendant keep the peace and be of good behavior. The defendant is remanded to the Sheriff of the City of Staunton for delivery to the Jailor.

Rudolph Bumgardner JUDGE

July 28, 1992

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF STAUNTON

COMMONWEALTH OF VIRGINIA

V. MISDEMEANOR NO. CR2000054-00

EARL LEROY NELSON

WRITTEN STATEMENT

Earl Leroy Nelson was tried in the Circuit Court for the City of Staunton on July 28, 1992, on appeal of a conviction in the General District Court for the City of Staunton on the charge of driving under the influence, a subsequent offense. t[sic]he Defendant waived his right to a jury trial and proceeded with Counsel on a plea of not guilty.

Staunton Police Officer A. W. Anderson was called to the stand and testified substantially as follows: While on patrol and in the performance of his duties as a city police officer, while in uniform and displaying his bade [sic], of authority

and in a marked police vehicle on January 12, 1992, at approximately 6:31 p.m., he observed a vehicle being driven by Earl Leroy Nelson who was at that time wearing a straw hat. He was in the median strip preparing to make a left-hand turn onto U.S. Route 250 East when he made the observation of Mr. Nelson who approached from his right headed in a westerly direction. The Nelson vehicle was being followed by a rescue squad ambulance. As he proceeded west, the rescue squad vehicle slowed down and pulled into the right-hand lane and his vehicle came immediately behind the Nelson vehicle. He observed the Nelson vehicle go into the right-hand lane without a turn signal, proceed all the way across the right-hand lane and approximately 3 to 4 feet over the white line on the shoulder of the road. He observed the vehicle apparently being jerked back onto the

road, and he observed the vehicle weaving a couple of times over the broken line and back again a second time over the right-hand line of the shoulder of the road a distance of 3 to 4 feet. The vehicle continued weaving down the road and stopped for a traffic signal on Richmond Road (U.S. Route 250 East). When the light turned green, the vehicle did not immediately proceed but waited for some time and then started moving again. The vehicle made another quick lane change without signal, and continued weaving until the point on Richmond Road where the police officer decided to activate his emergency lights. The vehicle did not stop in response to the blue lights but instead continued and made a left-hand turn onto Statler Boulevard, making a wide erratic turn. At that point, the police officer activated

both the siren and a loud horn to attempt to stop the vehicle. The vehicle proceeded up Statler Boulevard to a turn-off and an entrance into a tractor equipment sales lot. The officer indicated that he kept the vehicle under observation and that the vehicle pulled into a position roughly perpendicular to the police vehicle so that the police officer could observe the Nelson vehicle. The police officer immediately got out of his car and went up to the driver's side window where he observed Leroy Nelson sitting in the driver's seat of the vehicle looking straight ahead. The headlights were on the vehicle, and the motor was still running, and the keys were in the ignition switch. The police officer stated that he pecked on the window to get the driver's attention. When the driver finally rolled down the window, the officer asked to see his driver's license

and registration for the vehicle. A woman, later identified as Dorothea Moats, was seated in the passenger's seat and she looked through the glove compartment and produced the registration card.

The police officer watch as a the Defendant peeled through his wallet and passed over his driver's license two or three times, and then the police officer told Mr. Nelson that his license was in his wallet and that he had just passed by it. The police officer asked Mr. Nelson if he knew why he had stopped him, and Mr. Nelson replied that he did not. The police officer stated that he told him that he had observed him swerving and running off the road and making improper lane changes. He testified that Mr. Nelson replied that the children in the van had caused some problem and that he was going to a video store to return a

video. The police officer stated that Mr. Nelson was facing forward in the driver's seat and that his feet were squarely underneath the steering wheel down by the pedals and controls. The police officer stated that he told Mr. Nelson that he smelled an aroma of alcohol from the vehicle and asked him whether or not he had had anything to drink. Mr. Nelson stated that he had had a beer or two on that day. The police officer asked him if he would do him a favor if he didn't mind and to exit the vehicle and come back and talk with him. Mr. Nelson complied and Officer Anderson advised that he would appreciate it if Mr. Nelson would perform some field sobriety tests, which Mr. Nelson agreed to perform. Mr. Nelson at that time was wearing the same clothing as what the police officer had observed at the median strip. The police officer stated that Mr. Nelson was coop-

erative, somewhat indifferent, sort of carefree, and sleepy in appearance. He indicated that Mr. Nelson's speech was slurred and mushmouthed which was different from what he had observed in Mr. Nelson on other occasions. On cross examination, he admitted, he had never, prior to the stop, talked to Mr. Nelson. He asked Mr. Nelson to watch his pen as he moved it from left to right, and he observed that neither of Mr. Nelson's eyes could follow the pen smoothly. He indicated that Mr. Nelson's eyes showed a rapid jumping at a 45 degree angle. He indicated that Mr. Nelson could not keep his balance at all while standing to take a walk-and-turn test. The police officer testified that he was on a very level terrain with a slight grade but no rocks. The police officer stated that he asked Mr. Nelson to walk out 9 steps, turn

around, come back 9 steps, while touching heel to toe and holding his hands by his side and counting out loud each step he took. The police officer said that he observed Mr. Nelson stop while walking several times going out and coming back, and that he used his arms for balance as if he were on a tightrope. He asked Mr. Nelson if he would perform a one leg stand test, and Mr. Nelson complied. Mr. Nelson was swaying while balancing, used his arms for balancing, contrary to the instructions, and lost count. He was asked to count to 30 by one thousands, as in 1,001, 1,002, etc. He indicated that Mr. Nelson lost count with 1,012 and 1,013 and went back to 1,004 and went back to 12 or 13 and stopped again and jumped to 17 and 18 and missed counting 24 and 26 and that while he was doing this counting he was jumping around on one leg. Mr. Nelson was advised of the

preliminary alkasensor test. Mr. Nelson was transported to the police station where the test was properly administered. While at the police station and during the waiting time for the observations to be made, Officer Anderson advised Mr. Nelson of his rights under the Miranda rule, and Mr. Nelson elected to waive those rights and to discuss the matter with the police officer. In response to the inquiries by the police officer, Mr. Nelson stated that he was on Richmond Road going toward Statler Boulevard. He indicated that he was headed to Block-buster Video to return a tape. He stated that he had come from Brands Flat in Fishersville, which is his home, and that had started out at approximately 6:30 p.m. He stated that he did not know what time it was at that time. He indicated that he believed that it was Sunday,

January 12, 1992, and that he was in Staunton, Virginia. The actual time was 7:15 p.m., and it was Sunday, January 12, 1992. The defendant responded that he had last eaten at 2:00 p.m. and that he had eaten seafood from Long John Silver and indicated that he had been feeding his animals... [the remaining findings of fact are not pertinent to the appeal, except for the following:]

The evidence of the prior conviction and the DMV transcript, as well as the breath test, were all received into evidence by the Court without objection from the Defense...

Enter: Rudolph Bumgardner
Judge

Date: 11/10/92

Seen:

Paul E. Pysell, Assistant Commonwealth's

Attorney, City of Staunton, Virginia

Norman Lamson, p.d.

VIRGINIA: In the Court of Appeals of Virginia on Tuesday the 23rd day of November, 1993

Earl Leroy Nelson, Appellant

against Record No. 1703-92-3

Circuit Court No. CR92000054-00

Commonwealth of Virginia, Appellee

From the Circuit Court of the City of Staunton

Before Koontz, Retired Judges Covington and Griffith*

This petition for appeal is denied for the following reasons:

"No ruling of the trial court... will be considered as a basis for reversal unless the objection was stated together with the grounds therefor at the time of the ruling, except for good cause shown, or to enable the Court of Appeals to attain the ends of justice. A mere

statement that a judgment or award is contrary to the law and the evidence is not sufficient to constitute a question to be ruled upon on appeal." Rule 5A:18.

Here, the statement of facts provided by appellant does not reflect that appellant raised the issue of whether the term "sub offense" appearing on the warrant put him on notice that he was subject to the recidivist level of punishment. Certainly after his conviction in the district court he should have raised the issue at the de novo trial in the circuit court, if not prior to and during trial, then at sentencing. Without evidence of such objection in the record, we cannot say whether the trial court had an opportunity to address and correct the error, if any. The Court of Appeals will not consider an argument on appeal not offered before the trial court. See Evans-

Smith v. Commonwealth, 5 Va. App. 188, 195 n.2, 361 S.E.2d 436, 440 n.2 (1987). Accordingly, the petition for appeal must be denied.

---

*Retired Judges Kenneth M. Covington and Lewis H. Griffith took part in the consideration in this case by designation pursuant to Code sec. 17-116.01.

A copy,

Teste:

Cynthia L. McCoy, Acting Clerk

By Marty W. Ring

Deputy Clerk

VIRGINIA: In the Court of Appeals of Virginia on Tuesday the 4th day of January, 1994.

Earl Leroy Nelson, Appellant

against Record No. 1703-92-3

Circuit Court No. CR92000054-00

Commonwealth of Virginia, Appellee

Upon a Petition for Rehearing

Before Koontz, Retired Judges Covington and Griffith*

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 23rd day of November, 1993 and grant a rehearing thereof, the said petition is denied.

---

*Retired Judges Kenneth M. Covington and Lewis H. Griffith took part in the consideration in this case by designation pursuant to Code sec. 17-116.01.

A copy,

Teste:

Richard R. James, Clerk

By Cynthia L. McCoy

Deputy Clerk

VIRGINIA: IN THE SUPREME COURT OF VIRGINIA held at the Supreme Court Building in the City of Richmond on Monday the 1st day of August, 1994.

Earl Leroy Nelson, Appellant,

against Record No. 940188

Court of Appeals No. 1703-92-3

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 2nd day of June, 1994 and grant a rehearing thereof, the prayer of the said petition is denied.

A copy,

Teste:

David B. Beach Clerk

By: A. A ie [?]

Deputy Clerk

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 12th day of September, 1994.

Earl Leroy Nelson, Appellant,

against Record No. 940188
Court of Appeals No. 1703-92-3

Commonwealth of Virginia, Appellee.

ORDER DEFERRING ISSUANCE OF MANDATE

Upon consideration of the motion of the appellant, by counsel, it is ordered that issuance of the mandate entered herein be and the same hereby is deferred, to and including the 31st day of October, 1994, on the expiration of which time the same may be issued, unless the case has been docketed in the Supreme

Court of the United States, in which event issuance of the mandate shall be deferred until the final determination of the case by that Court.

A copy,

Teste:

David B. Beach Clerk